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No. 88-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CRAIG E. CALDWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

1. Introduction

This case has *nothing* to do with petitioner's innocence or guilt. It has to do with whether Congress has authorized the widespread practice under which federal prosecutors and the targets of criminal investigations may, acting in concert, ignore the applicable statute of limitations even though the language of that statute plainly says that they may not do so. The Government contends in its Memorandum in Opposition ("Opp.") that the criminal justice system should await the resolution of this question until petitioner has been found guilty of the offenses for which he has been indicted. The question, however, is whether petitioner can be indicted, not whether the Government can procure a conviction. The Government should be required to address the merits of petitioner's argument and defend in this Court its remarkable theory, pressed below and in many other courts, that the language of the federal criminal statute of limitations is irrelevant to what the statute means.

2. The Posture of This Case Militates *For*, not Against, Review by the Court Now

In its Opposition, the Government pursues, albeit under a somewhat different guise, the same strategy it has pursued in every court in which a defendant has challenged the validity of a bi-lateral arrangement to suspend a criminal statute of limitations. That strategy is to avoid any pretense of trying to explain to any court how the exceptions clause of 18 U.S.C. § 3282 can possibly be interpreted to permit that practice in the total absence of a law authorizing that

practice. Instead of addressing the merits, the Government insists that this case should not be heard *at this time* because of what the Government characterizes as the "interlocutory" posture of the case. Opp., at 3 n.*.

This case is not, however, interlocutory in the eye of either petitioner or the law. Unless this petition is granted, petitioner will be stripped of the core protection afforded to all persons by criminal statutes of limitations—the statutory right *not to have to defend against* criminal charges that are facially barred by the limitation.

The Government's argument, simply put, is that this Court's resolution of petitioner's challenge should await the trial and his conviction, upon which he will be able once again to present his challenge to the validity of this widespread practice to this Court if his conviction is otherwise affirmed on appeal by the court below.[1] The Government, of course, automatically prevails if petitioner is acquitted, because his challenge to this practice would be mooted after he had been put through the very trial that he contends cannot legally go forward.

The Government does not suggest that the Court lacks the power to hear this case at this time. The question posed by the Government's position is

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[1] Because the Government presumptively intends to conduct petitioner's trial free from any reversible error, the opposition is necessarily based on the proposition that petitioner should be forced to stand trial on charges that are facially barred by the statute of limitations and either be acquitted—in which case his challenge is literally mooted, or be convicted, after which the Government would expect the Ninth Circuit to affirm that conviction summarily based upon its decision on this appeal.

whether the Court should exercise that power now. The Government's position provokes several questions. First, why would this Court, by denying certiorari, consciously place itself in the position where it can at some later date vindicate petitioner's right not to be haled into court at all only by reversing an otherwise valid conviction? Second, why should petitioner stand trial and endure a public conviction before this Court exercises its undoubted authority to declare that he should not even have been indicted, let alone subjected to a trial and a conviction? Third, and perhaps most importantly, why should this Court delay its consideration of the legality of a widespread practice going to the heart of the administration of the federal criminal justice system when there is no evident legal basis upon which to support that practice?

In a closely analogous context, then-Judge Scalia asked similar questions in stating his position that 28 U.S.C. § 1291 should be construed to authorize an appeal from a District Court's denial of a motion to dismiss an indictment on double jeopardy grounds. Responding to the contorted logic of the majority's contrary opinion, Judge Scalia observed, rhetorically:

> **I can understand why one might perform intellectual gymnastics of this sort to *avoid* the results which the majority opinion produces—but surely not to *achieve* them. Why would one, with malice aforethought, place appellate courts in the position where they can only vindicate constitutional rights by awaiting proof positive that the person they set free is guilty? Or why subject a defendant to a second trial and a public**

conviction before permitting appellate courts to pronounce that he should not have been tried twice?

United States v. *Richardson*, 702 F.2d 1079, 1089 (D.C. Cir. 1983) (Scalia, J., dissenting).

The force of Judge Scalia's logic was sustained when this Court granted review in *Richardson* and reversed the D.C. Circuit. *Richardson* v. *United States*, 468 U.S. 317 (1984). In his opinion for the Court, then-Justice Rehinquist recognized the "strong congressional policy embodied in § 1291 against interlocutory appeals in criminal cases," *id.*, at 320, but concluded that the claim in that case met the three-part test established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949),[2] because, as the Court had previously recognized, the defendant "contested the very power of the Government to bring a person to trial, and the right would be significantly impaired if review were deferred until after the trial." 468 U.S., at 320.

Although the issue in *Richardson* involved the power of courts of appeals to entertain interlocutory appeals in criminal cases involving double jeopardy claims, the policies identified by the Court as *requiring* the courts of appeals to entertain such claims speak directly to whether this Court should exercise

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[2] Under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), an order of a District Court that conclusively determines a disputed issue, resolves an important question completely separate from the merits of the case, and involves an important right that would be lost, probably irreparably, if review is delayed, is appealable under the so-called collateral order doctrine.

its discretionary jurisdiction to review this case at this time. Unlike the situation in *Richardson*, which was conceded by the Court to involve a claim that was not completely collateral to the merits of the prosecution, *id.* at 321, petitioner's claim has nothing whatsoever to do with the merits of the Government's case against him. Petitioner's claim involves a pure issue of statutory construction, not, as in *Richardson*, a claim that required the appellate court to canvass the record made at the defendant's first trial and thereby involve itself in a very real sense in the merits of the defendant's case.

Furthermore, while petitioner's right may not be as directly based upon the Constitution[3] as was the double jeopardy claim in *Richardson*, it is nevertheless—by any measure—a right of great importance not merely to petitioner but to every person whose conduct may come under the scrutiny of federal prosecutors. As characterized by the Government in the court below, petitioner's "right" under § 3282 "is first and foremost to protect the individual *from having to defend* against old claims . . . ." Br. for United States, at 15 (emphasis added). Under the Govern-

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[3] As petitioner points out in the Petition, at 24 n.16, the Government itself has taken the position in this Court that criminal statutes of limitations perform at the pre-indictment stage the same function of requiring that cases be brought to trial quickly as is performed by the Sixth Amendment at the post-indictment stage. As this Court's decision in *United States* v. *Marion*, 404 U.S. 307, 322-24 (1971), makes clear, adherence to statutes of limitations should make it unnecessary to constitutionalize this area of the law at the pre-indictment stage. The decision of the Ninth Circuit below in this case invites such constitutionalization by effectively discarding the statutory regime enacted by Congress to address this constantly recurring issue.

ment's own view of the right at stake, that right protects all potential defendants "not only from the consequences of litigation's results but also from the burden of defending themselves." *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979), *quoting Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). Yet the Government now asks this Court, by postponing review, irreparably to strip petitioner of the very right he seeks to vindicate.[4] There is no warrant for the Government's position.

3. This Case Presents a Serious and Unsettled Question Which Demands Speedy and Definitive Resolution by this Court

As petitioner demonstrates in his Petition, the lower federal courts are in disarray not only with respect to whether the practice challenged in this case is legal but how the legality of the practice should be analyzed. There is certainly no point in sending petitioner back to the Ninth Circuit to relitigate this question,

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[4] The Government offers consolation to petitioner by asserting, Opp., at 2, that petitioner is "in precisely the same position he would have occupied if the district court had denied his motion to dismiss." The unarticulated premise of this statement is that the denial of petitioner's motion would not have been appealable. This case does not present that issue because petitioner convinced the district judge—himself a former career state prosecutor—that the statute of limitations imposed at least some measure of discipline on the prosecution of cases by the Government. As the discussion in the text above suggests, however, it is far from self-evident that a denial of petitioner's motion to dismiss his indictment would not have been appealable as a collateral order under this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984). Indeed, under the Government's own submission in *Richardson*, *see* Br. of United States, at 10, such a denial would manifestly be appealable unless the "right" asserted were held not to be "important."

which was decided against him by a court that believed itself bound by a prior Ninth Circuit case which, as petitioner argued below, essentially has nothing to do with the merits of his challenge. Given this confusion within the lower courts—confusion perpetuated by the Government's success in arguing that the language of § 3282 is essentially irrelevant to the inquiry—this question is not likely to go away.[5]

As importantly, this case, much more so than criminal cases such as *Richardson* and *Helstoski* in which the Court has recognized a right to appellate review notwithstanding their interlocutory posture, involves a widespread practice that may be occurring literally dozens of times per day. For all this Court has been told by the Government in its Opposition, federal prosecutors, and defendants with little choice in the matter, may have, in fact, rendered the federal statute of limitations a nullity. Petitioner submits that

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[5] As of the time of submission of this Reply Memorandum, the Sixth Circuit still had this issue under submission in a case argued to a panel of that court in December 1987. *United States* v. *Del Percio*, No. 87-1396. Were the Government's position to be rejected in that case, the Solicitor General would presumably seek review by this Court in a case which, as here, had not yet gone to trial.

the mere possibility that they may have done so, or could do so, demands review of this case in its present posture.[6]

January 18, 1989 Respectfully submitted,

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[6] Petitioner urges that the Government be requested by the Court to respond to this Petition on the merits and that the Court then consider this Petition or defer action on it until the Sixth Circuit issues its decision in *United States* v. *Del Percio*.